IN THE

Supreme Court of the United States

DEC 24 1951
MORE CRO
CL

OCTOBER TERM, 1951.

No. 492

MARIKO KUNIYUKI,

Petitioner,

vs.

DEAN ACHESON, as Secretary of State of the United States of America,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

SUBJECT INDEX

PAGE

Opinion below 1

Jurisdiction 2

Statutes involved 2

Questions presented 3

Statement 4

Reasons for granting the writ 6

Argument 11

I.

Title 8, United States Code, Section 801(e) is unconstitutional 11

II.

The elections in which petitioner voted in Japan in 1946 and 1947 were not political elections within the meaning of 8 U. S. C. 801(e) 15

III.

At the time of the elections in 1946 and 1947, Japan was not a foreign state within the meaning of 8 U. S. C. 801(e) 20

IV.

Petitioner did not act voluntarily and therefore cannot be adjudged to have lost her United States citizenship 27

A. What is "voluntary"? 33

PAGE

V.

The loss of citizenship provided for in 8 U. S. C. 801(e) refers to a situation showing a shift of allegiance and a real attachment to a foreign country. It was not intended to effect expatriation where the citizen was acting for this country and in furtherance of its objectives..... 38

Conclusion 42

Appendix "A." Full text of newspaper release of the memorandum from the United States Consul at Yokohama to the State Department in Washington, D.C., on the subject "Material Regarding Japanese Elections".....App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Acheson v. Murakami, 176 F. 2d 953	9, 14, 33, 34
Adams v. United States ex rel. McCann, 317 U. S. 269	11
Ainslee v. Martin, 9 Mass. 454	14
Altvater v. Freeman, 319 U. S. 359	9
American Communications Assoc. v. Douds, 339 U. S. 382	12
Arikawa-Tsunashima v. Acheson, 83 Fed. Supp. 473	4
Armstrong v. Alliance Trust Co., 126 F. 2d 164	17
Atchison etc. Ry. v. O'Connor, 223 U. S. 280	36
Brehm v. Acheson, 96 Fed. Supp. 662	10
Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. Ed. 25	23
Comitis v. Parkerson, 56 Fed. 556	40
Commonwealth v. Likely, 267 Pa. 310, 110 Atl. 167	19
Dant & Russell v. Board of Supervisors of L. A. County, 21 Cal. 2d 534	23
Doreau v. Marshall, 170 F. 2d 721	39
Dos Reis v. Nicolls, 161 F. 2d 860	13, 27, 39
Falbo v. United States, 320 U. S. 549	17
Furuno v. Acheson, 94 Fed. Supp. 358	4, 16
Furusho v. Acheson, 94 Fed. Supp. 1021	4
Glasser v. United States, 315 U. S. 60	11
Graver Mfg. Co. v. Linde Co., 336 U. S. 271	27
H, Matter of, 1 I & N, 239	18, 19
Hirabayashi v. United States, 320 U. S. 81	17
Johnson v. Zerbst, 304 U. S. 458	11
Kai v. Acheson, 94 Fed. Supp. 383	4, 16
Kawakita v. United States, No. 220, Misc., Oct. term, 1951	7
Kuwahara v. Acheson, 96 Fed. Supp. 38	4, 16, 34, 37
Lapides v. Clark, 176 F. 2d 619, cert. den. 338 U. S. 860, rehear. den. 338 U. S. 888	9, 12, 13
Mackenzie v. Hare, 239 U. S. 299	8, 13

PAGE

Moser v. United States, 341 U. S. 41 ..... 8, 11
Murata v. Acheson, 99 Fed. Supp. 591 ..... 6, 7, 14
Murray v. The Schooner Charming Betsy, 2 Cranch (U. S.) 64 .. 13
Nakashima v. Acheson, 98 Fed. Supp. 11 ..... 4, 34, 40
National Labor Relations Board v. E. C. Atkins Co., 331 U. S. 398 16
National Labor Relations Board v. Jones & Laughlin, 301 U. S. 1 34
Newberry v. United States, 256 U. S. 232 19
Okimura v. Acheson, 99 Fed. Supp. 587 ..... 6, 7, 14
Ouye v. Acheson, 91 Fed. Supp. 129 4
Perkins v. Elg, 307 U. S. 325 ..... 19, 27, 28
Rice v. Olson, 324 U. S. 786 12
Rokui v. Acheson, 94 Fed. Supp. 439 ..... 4, 16
Savage v. U. S. District Court, 144 F. 2d 575 17
Savorgnan v. United States, 338 U. S. 491 8
Schneiderman v. United States, 320 U. S. 120 ..... 19, 28
Seki v. Acheson, 94 Fed. Supp. 438 ..... 4, 16
Spelor v. United States, 171 F. 2d 208 23
Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368 17
Standard Oil Co. v. Johnson, 316 U. S. 481 17
Stranks v. Dupont, 3 Pet. (U. S.) 241 13
Tempel v. United States, 248 U. S. 121 17
The Eliza Lines, 199 U. S. 119 ..... 9, 36
The Lucy H., 235 Fed. 610 23
The Three Friends, 166 U. S. 54 23
Union Pac. Ry. Co. v. Public Service Commission, 248 U. S. 67 9
United States v. Wong Kim Ark, 169 U. S. 649 13
Uyeno v. Acheson, 96 Fed. Supp. 510 ..... 4, 36
Von Moltke v. Gillies, 332 U. S. 708 11
Watts v. Indiana, 338 U. S. 49 ..... 9, 36

PAGE

Wildberger, In re, 214 Fed. 508 19
Wohlmuth v. Acheson, No. C. A. 520-50 (Nov. 10, 1950) 10
Yada, George, v. Acheson, 94 Fed. Supp. 438 ..... 4, 16
Yada, Henry, v. Acheson (D. C., S. D. Calif., No. 1008-SD), unreported 4
Yamamoto v. Acheson, 93 Fed. Supp. 346 4
Yonemura v. Acheson, No. 965 (D. C., D. Haw.), unreported 4
Young v. Hoaglund, 212 Cal. 426 36

MISCELLANEOUS

America and Other American Republics on the Rights and Duties of States (49 Stat. 3097) 22
86 Congressional Record, p. 1 (76th Cong., 3d Sess., 1948) 40
Deposition of Justin Williams, Chief of the Parliamentary and Political Division of Government Section (SCAP) 15
Extract from deposition of Kiyoshi Togasaki, editor of the Nippon Times, English language paper published in Tokyo 15
Extracts from No. 17, Summation of Non-Military Activities in Japan (SCAP, Feb., 1947) 15
Extract from Unclassified State Department document dated May 5, 1950, subject: Material Regarding Japanese Elections, From Yokohama to the Department 15
General Headquarters Far Eastern Command 41
Los Angeles Times, May 4, 1951, p. 3, col. 3 24
Political Reorientation of Japan (SCAP, 1) 21
Political Reorientation of Japan (SCAP 5) 21, 22
Political Reorientation of Japan (SCAP 7) 22
Political Reorientation of Japan (SCAP 370, 372, 374, 376) 29
Political Reorientation of Japan (2 vols.), official report of Government Section (SCAP, 1950) 15
Selected Data (SCAP 17) 25
Selected Data (SCAP 42) 26

PAGE

Selected Data (SCAP 65) 26

Selected Data (SCAP 69) 26

Selected Data (SCAP 71) 26

Selected Data (SCAP 75, 76) 26

Selected Data (SCAP 80) 25

Selected Data (SCAP 164) 22

Selected Data on the Occupation of Japan, p. 131, Chart 4 42

Selected Data on the Occupation of Japan, official publication of Supreme Commander for the Allied Powers (SCAP, 1950) 15

Treaties, Conventions, International Act, Protocols and Agreements Between the United States and Other Powers, Vol. 4, p. 4807 22

Webster's New International Dictionary (Unabridged) Second Edition, 1949 36

STATUTES

Federal Rules of Civil Procedure, Rule 52a 27

Nationality Act of 1940, Sec. 401(c) 38

58 Statutes at Large, Chap. 368, Sec. 1, p. 677 14

United States Code, Title 8, Sec. 800 ..... 12, 13

United States Code, Title 8, Sec. 801(c) 6, 13, 38

United States Code, Title 8, Sec. 801(e) 2, 3, 7, 15, 17, 26

United States Code, Title 8, Sec. 801(i) 14

United States Code, Title 8, Sec. 803 13

United States Code, Title 28, Sec. 1254(1) 2

United States Constitution, Art. I, Sec. 8, Clause 4 12

United States Constitution, Fourteenth Amendment 11, 14

TEXTBOOKS

PAGE

17 American Jurisprudence, Sec. 7 36

37 American Law Review, pp. 191, 192, Slaymaker, The Right of the American Citizen to Expatriate 13

Getty, The Law of Citizenship in the United States (Univ. of Chicago Press, 1934) 13

1 Hackworth, Digest of International Law, p. 47 22

14 Harvard Law Review, pp. 165, 179, Moore, A Hundred Years of American Diplomacy 13

2 Oppenheim, International Law (6th Ed., 1944), Sec. 166, p. 342 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

MARIKO KUNIYUKI,

Petitioner,

vs.

DEAN ACHESON, as Secretary of State of the United States of America,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit [R. 138, 139] reversing the judgment of the United States District Court for the Western District of Washington [R. 44] which had adjudged petitioner to be a citizen of the United States and not to have lost her citizenship by reason of her voting in Japan in April, 1946.

Opinion Below.

The opinion of the trial court [R. 8] is reported at 94 Fed. Supp. 358. The opinions of the court below [Opinion, R. 130; Opinion on rehearing, R. 140] are reported at 189 F. 2d 741 and 190 F. 2d 897, respectively.

Jurisdiction.

The judgment of the court below [R. 138] was filed and entered on June 14, 1951. Petition for rehearing was timely filed [R. 139] and the order of the court denying said petition was made and entered on July 27, 1951 [R. 139]. By order, dated October 16, 1951, of the Hon. William O. Douglas, time within which this Petition for Writ of Certiorari may be filed was extended to and including December 24, 1951.

The question as to the constitutionality of the statute involved was raised by petitioner in the lower court (Appellee's Br. 24), but not discussed in the court's opinion. This fact was pointed out to the court below in the Petition for Rehearing (p. 15) and the argument of unconstitutionality again made. The point was again not discussed in the court's opinion on denial of rehearing [R. 140].

The jurisdiction of this court is invoked under the provisions of 28 U. S. C. 1254(1).

Statute Involved.

Title 8, United States Code, Section 801(e) provides in pertinent part:

> "A person who is a national of the United States, . . . by birth . . . shall lose his nationality by: . . .
>
> (e) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."

Questions Presented.

1. Whether 8 U. S. C. 801(e) on its face and as construed and applied to petitioner, a native born American citizen, to deprive her of that citizenship, is unconstitutional in violation of the 14th Amendment to the Constitution which granted her that citizenship.

2. Whether, within the meaning and intent of 8 U. S. C. 801(e), the elections held in Japan in 1946 and 1947 under orders and at the instance of General Douglas MacArthur, Supreme Commander for the Allied Powers, were political elections.

3. Whether, within the meaning and intent of 8 U. S. C. 801(e), Japan in 1946 and 1947 was a foreign state.

4. Whether a person, such as petitioner, who voted in Japan in 1946 and 1947, as a result of overwhelming pressure, brought about by the United States' armed forces in Japan, and in a desire to carry out the aims and objectives of the United States in Japan, shall be decreed to have lost her United States Citizenship.

5. Whether the decision of the lower court, as distinguished from the decision of the trial court who had opportunity to and did observe the petitioner under oath on the witness stand, that petitioner did not vote involuntarily, is correct for the purposes of 8 U. S. C. 801(e).

Statement.

Like hundreds of other young Nisei (American born persons of Japanese born parents), petitioner was stranded in Japan by reason of the onvent of World War II [R. 58]. And like hundreds of other young Nisei she was caught up, after the war, by the wave of the democratic spirit engendered by General MacArthur and the other United States representatives in SCAP (Supreme Commander for the Allied Powers) and by overwhelming public pressure and voted in elections in 1946 and 1947 ordered by SCAP [R. 70, 74-75; Pltf. Ex. 5, pp. 4-9; Pltf. Ex. 6; Pltf. Ex. 2, pp. 24-26, 136].

Petitioner's case is unique, however, in that she alone, of all the cases that have been tried[1] and which have involved facts and circumstances so identical as to be substantially the same, has had a court decree that she lost her American citizenship.

Hence the appeal to this court.

[1] *Arikawa-Tsunashima v. Acheson* (D. C., S. D. Calif.), 83 Fed. Supp. 473;
Ouye v. Acheson (D. C., D. Haw.), 91 Fed. Supp. 129;
Yonemura v. Acheson, No. 965 (D. C., D. Haw.), Unreported;
Yamamoto v. Acheson (D. C., D. Ariz.), 93 Fed. Supp. 346;
Furuno v. Acheson (D. C., S. D. Calif.), 94 Fed. Supp. 868;
Kai v. Acheson (D. C., S. D. Calif.), 94 Fed. Supp. 383;
Seki v. Acheson (D. C., S. D. Calif.), 94 Fed. Supp. 438;
Rokui v. Acheson (D. C., S. D. Calif.), 94 Fed. Supp. 439;
George Yada v. Acheson (D. C., S. D. Calif.), 94 Fed. Supp. 438;
Kuwahara v. Acheson (D. C., S. D. Calif.), 96 Fed. Supp. 38;
Furusho v. Acheson (D. C., D. Haw.), 94 Fed. Supp. 1021 (On appeal);
Uyeno v. Acheson (D. C., S. D. Wash.), 96 Fed. Supp. 510;
Henry Yada v. Acheson (D. C., S. D. Calif., No. 1008-SD) Unreported;
Nakashima v. Acheson (D. C., S. D. Calif.), 98 Fed. Supp. 11.

Plaintiff was born in Seattle, Washington, on July 2, 1916 [R. 49]. When she was 3 years old she was taken by her parents to Japan [R. 54]. Her parents returned to the United States after 7 months [R. 54] and left petitioner with relatives so that petitioner might receive an education in Japan [R. 55]. Petitioner's brother returned to the United States [R. 55] and later served in the Army of the United States for 4 years [R. 51]. In 1940 petitioner returned to the United States intending to remain permanently [R. 57]. In 1941, during the summer vacation [R. 58] her aunt begged her to return to Japan for a final visit before her permanent settlement in the United States [R. 74]. When she tried to return to Seattle, she was not permitted so to do by the Japanese militarists [R. 74], and she was detained in Japan throughout the war [R. 74].

After the war General MacArthur, as SCAP, took over complete control of the country and administered it, down to the last detail [Pltf. Ex. 2], in order to carry out the "objectives of the United States" [Pltf. Ex. 2, p. 10]. For the first time in the history of Japan, still under orders from General MacArthur, women were permitted to vote [R. 74; Pltf. Ex. 2, p. 25]. On January 12, 1946, SCAP ordered that the first post-war elections be held [Pltf. Ex. 2, pp. 24-25]. A tremendous and studied (properly so, of course) program was instituted and successfully carried out by SCAP for the very purpose of inducing all persons to vote [R. 75; Pltf. Ex. 5, pp. 4-9], especially the women [Pltf. Ex. 6].

Under this overwhelming pressure from SCAP, who, petitioner thought, represented President Truman [R. 98], and not knowing that she might lose her United States citizenship [R. 31], but on the contrary believing that she

was doing what this country wanted her to do [R. 30], petitioner voted, because, and there is no controversy of fact on this, she thought "it was absolutely essential" [R. 75] and because the repeated emphasis by the occupation forces made her believe that it was her "duty to vote" [R. 70]. Petitioner did not vote in later similar elections in Japan because by then she had learned that by so doing she might lose her American citizenship [R. 69].

Under this state of facts, the lower court, contrary to the trial court, held that the terrible punishment of loss of citizenship should be visited upon petitioner.

Reasons for Granting the Writ.

1. The question of the constitutionality of the statute involved is of great importance, not only to the petitioner here, but to the entire administration of justice on the question of loss of citizenship. The precise statute involved has been declared unconstitutional by the United States District Court for the District of Hawaii in *Okimura v. Acheson*, 99 Fed. Supp. 587. That case, together with *Murata v. Acheson*, 99 Fed. Supp. 591 (holding unconstitutional the related section, 8 U. S. C. 801(c)), are presently before this court on direct appeal. (*Acheson v. Okimura*, No. 421, Oct. Term 1951, and *Acheson v. Murata*, No. 422, Oct. Term, 1951.) Despite the fact that petitioner raised and argued the constitutional point in the court below, the failure of that court to discuss the point, and its holding adjudging that petitioner lost her citizenship, can only be considered a holding that the statute is constitutional and therefore in direct conflict with the *Okimura* and *Murata* decisions now before this court.

In addition there is pending in this court the case of *Kawakita v. United States* No. 220, Misc., Oct. Term, 1951. This latter case is here on certiorari from the same court below. In that case the court below held that petitioner did *not* lose his United States citizenship despite an intent so to lose it. In the case at bar the court below held that petitioner *did* lose her United States citizenship despite an intent not to do so and in the face of an inducement by this government akin to, if not technically identical with, entrapment.

To settle the conflict between the case at bar and the *Okimura* and *Murata* cases and to clarify the confusion between the *Kawakita* case and the case at bar, review of this court is needed.

2. The court below has decided important questions of federal law which have not been, but which should be decided by this court, namely:

a. What kind of an election is within the meaning and intent of 8 U. S. C. 801(e) to the effect that a native born United States citizen shall lose his citizenship by voting in a political election (in a foreign state). That is, whether an election conducted by orders and under the supervision of the representative of the United States (SCAP), the results of which could be set aside by him if they did not please him [Pltf. Ex. 2, pp. 25-26] is the "political election" intended by congress;

b. Whether a territory over which the United States has complete power and control and over which that power and control is administered down to the last detail, including the changing and promulgation of a new constitution and laws [Pltf. Ex. 2], is a foreign state within the meaning and intent of 8 U. S. C. 801(e). That is, whether

Congress intended that a United States citizen should lose his precious heritage of citizenship when he voted at the behest of Americans in Japan for purposes to carry out the objectives of the United States.

3. The lower court has decided questions of federal law probably in conflict with applicable decisions of this court, namely:

a. The decision of the lower court is in conflict with the intent, meaning and language of the decision in *Moser v. United States,* 341 U. S. 41. Whereas in the case just cited, this court held that one will not be deprived of his rights to citizenship unless he "knowingly and intentionally" waived them and that "nothing less than an intentional waiver is required by elementary fairness," the court below in the instant case held that "the fact, if it be a fact, that (petitioner) did not intend to lose her nationality and did not know that she would lose it if she voted in these elections is immaterial" [R. 137]. In relying on *Savorgnan v. United States,* 338 U. S. 491, as authority for its position, the lower court failed to heed the words of this court in *Moser* in discussing *Savorgnan*; that in *Savorgnan,* petitioner "sign(ed) one thing and claim(ed) another." It seems manifest that this court in *Moser* indicated that the *Savorgnan* decision is not to be given the strict and literal interpretation attributed to it by the court below. To dispel the confusion thus cast upon the problem review of the instant case should be granted.

b. The decision of the court below is contrary to *Mackenzie v. Hare,* 239 U. S. 299, which holds "that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen." (239 U. S. at 311.) And it is also in conflict with the decision of the Court of Appeals for the District of Columbia in

Lapides v. Clark, 176 F. 2d 619, 621, cert. den. 338 U. S. 860, reh. den. 338 U. S. 888, where that court held, in referring to expatriation.

> "It deals with a condition voluntarily brought about by one's own acts, *with notice of the consequences. In that sense that is a concurrence by the citizen.*" (Italics added.)

Manifestly there was no "concurrence of the citizen" nor any "notice of the consequences" in the case at bar. Indeed when petitioner did have notice of the consequences (loss of citizenship if she voted in the 1948 elections), *she did not vote—precisely because of such notice* [R. 69].

Furthermore, the decision of the lower court is in conflict with its own decision in *Acheson v. Murakami,* 176 F. 2d 953, where it held that before there could be loss of citizenship, there must be a "free and intelligent choice" (p. 954).

c. The decisions of the court below on whether petitioner's action was voluntary are in conflict with the meaning and intent of this court's decision in *Watts v. Indiana,* 338 U. S. 49, which holds that there need not be physical force in order to render one's action involuntary and it is also in conflict with the meaning and intent of cases like *The Eliza Lines,* 199 U. S. 119; *Union Pac. Ry. Co. v. Public Service Commission,* 248 U. S. 67, and *Altvater v. Freeman,* 319 U. S. 359, which hold that compulsion may actually exist so as to make one's action involuntary despite the appearance of freedom of choice.

In reversing the trial court, despite the latter's opportunity to observe the petitioner under oath on the witness

stand, the lower court failed to apprehend or give account to the tremendous pressures prevailing in Japan and at work upon petitioner; pressures which were the result of our own American representatives; pressures which petitioner could not resist. In so doing, the court below adopted a definition of voluntary conduct which is clearly at variance with the above decisions of this court as well as with the dictionary meaning of the word.

But even if it be felt that the cited decisions are not applicable to the situation at bar, review of this case should be granted to correct an obvious injustice. No such result as reached by the lower court on the facts of this case could possibly be intended by Congress when it passed the act. Nor can the decision stand the test of weight on the scales of justice. As suggested above, if this be not a case of actual technical entrapment, it is so closely akin to it, that in the interest of justice, the decision should not be permitted to stand. At the very least, review to consider this question should be granted.

4. Review by this court is necessary because of the importance of securing an interpretation of the section in the administration of cases from countries other than Japan where similar problems have arisen. See, for example, the decision of the United States District Court of the District of Columbia in *Wohlmuth v. Acheson,* No. C. A. 520-50 (Nov. 10, 1950) (on appeal) holding that for the purposes of the statute an election in post-war Germany was not an election in a foreign state. (Accord, *Brehm v. Acheson,* 96 Fed. Supp. 662.)

ARGUMENT.

I.

Title 8, United States Code, Section 801(e) Is Unconstitutional.

The argument as to unconstitutionality is very simple and, it is submitted, manifestly correct. It is this: A native born citizen such as petitioner here is a citizen of the United States not by act or grace of Congress but by the mandatory command of the Constitution (the 14th Amendment). The right to citizenship being petitioner's by reason of the Constitution, Congress has no more power to take away that right any more than it would have the power to take away the right to counsel or to trial by jury.

The question of waiver or consent to the loss of a constitutional right is, of course, another question. But it is Hornbook law that before one can waive a fundamental right, especially one bottomed in the Constitution, it must be an intelligent and knowing and consented to waiver. This court has made it clear that it will stand for nothing less, and every reasonable presumption is indulged in *against* the waiver. (*Glasser v. United States,* 315 U. S. 60, 71; *Adams v. United States, ex rel McCann,* 317 U. S. 269; *Von Moltke v. Gillies,* 332 U. S. 708; *Johnson v. Zerbst,* 304 U. S. 458, 464.) Specifically in connection with loss of citizenship rights, this court has held that "nothing less than an intelligent waiver" will suffice. (*Moser v. United States,* 341 U. S. at 41.)

Therefore, just as it would be patently unconstitutional for *Congress* to say that one who pleads guilty (even voluntarily) to an offense, shall thereby lose his right to counsel (*Rice v. Olson,* 324 U. S. 786), so also is it patently unconstitutional for *Congress* to have said that a native born American citizen who votes in a political election in a foreign state shall thereby cease to be an American citizen, even though he votes voluntarily.

Aside from a knowing and consented to waiver of the right to citizenship (the right of expatriation declared as a part of our public policy in 8 U. S. C. 800), *Congress simply has no power to take that citizenship away.*[2] In other words, what the Constitution gives, Congress cannot take away. (Compare Justice Frankfurter in *American Communications Assoc. v. Douds,* 339 U. S. 382, 419: "no matter what its notions of policy may be, the Eighth Amendment, for example, bars Congress from inflicting 'cruel and unusual punishments.' ")

There is ample authority for this reasoning.

---

[2]The question as to whether Congress has this power over naturalized citizens is not involved in this case and need not detain us. Clearly a different question is presented. The Constitution (Art. I, Sec. 8, Cl. 4) specifically gives Congress power over naturalization. This power is expressly lacking over native born citizenship. Having the power over naturalization, Congress may perhaps, so long as not arbitrary, impose conditions on the continuation of the grant of citizenship. That there may be a difference between native born and naturalized citizens, see *Lapides v. Clark,* 176 F. 2d 619, cert. den. 338 U. S. 860, reh. den. 338 U. S. 88.

In *United States v. Wong Kim Ark,* 169 U. S. 649, 703, this court said:

> "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."

In *Dos Reis v. Nicolls,* 161 F. 2d 860 (C. C. A. 1, 1947), the court indicated its doubts as to the constitutionality of the law (there it was 8 U. S. C. 801(c)) but did not reach the point because it held that in any event there was no loss of citizenship if the person acted involuntarily and that in that case the action was involuntary.

In *MacKenzie v. Hare,* 239 U. S. 299, 311, 312, it was pointed out

> "that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen" and "with(out) notice of the consequences." (See also, *Lapides v. Clark, supra,* 176 F. 2d 619, 621.)

Although Congress has declared, as the public policy of this nation, the "right" of expatriation (8 U. S. C. 800), it is clear that unless the United States gives consent, a citizen cannot expatriate himself, even though he want to and do all in his power so to do. (See, *e. g.,* 8 U. S. C. 803.) Ample authority supports this principle.[3] The

---

[3]Getty, *The Law of Citizenship in the United States* (Univ. of Chicago Press, 1934); Slaymaker, *The Right of the American Citizen to Expatriate,* 37 Am. L. Rev. 191, 192; Moore, *A Hundred Years of American Diplomacy,* 14 H. L. R. 165, 179; *Stranks v. Dupont,* 3 Pet. (U. S.) 241, 245; *Murray v. The Schooner Charming Betsy,* 2 Cranch (U. S.) 64, 120.

most recent and dramatic example is the enactment of 8 U. S. C. 801(i) in 1944 (chap. 368, sec. 1, 58 Stat. 677) to permit the Japanese evacuees at Tule Lake to renounce. See *Acheson v. Murakami,* 176 F. 2d 953, 962 (C. C. A. 9, 1949) (Finding 19).

Therefore, it is clear that citizenship is a relationship between the citizen and the sovereign which is *insoluble* without the concurrence of *both.* This was long ago recognized in an early Massachusetts case:

> "Protection and allegiance are reciprocal. The sovereign cannot refuse his protection to any subject, *nor discharge him from his allegiance against his consent;* and he will remain a subject, unless disfranchised as a punishment for some crime." (Italics added.)
>
> *Ainslee v. Martin,* 9 Mass. 454.

In other words, citizenship, at least as to a native-born 14th Amendment citizen, is a two-way highway, not a one-way street. Congress, in legislating away petitioner's citizenship without her concurrence or consent, has broken the rules of the road.

The latest authority, of course, are the decisions, now here for review, as pointed out above, of the District Court for the District of Hawaii holding *squarely* the precise statute here in question to be unconstitutional as beyond the powers of Congress (*Okimura v. Acheson,* No. 421, Oct. Term, 1951, and *Murata v. Acheson,* No. 422, Oct. Term, 1951). It is submitted that these decisions are correct and should be followed here.

II.

The Elections in Which Petitioner Voted in Japan in 1946 and 1947 Were Not Political Elections Within the Meaning of 8 U. S. C. 801(e).

Of course, if the elections in which petitioner voted were not political elections within the meaning of 8 U. S. C. 801(e), one of the elements required by the statute was not present and accordingly no loss of citizenship resulted.

The trial court made express findings as to the nature of the elections [R. 41-43] and discussed the question in its opinion [R. 21, 22]. The court below dismissed this result (concurred in by some 9 District Court cases) by simply indicating that the reasoning in two other District Court cases was more persuasive to it [R. 132, 133].

It is submitted that the reasoning and holding of the trial court is correct. The facts[4] are ample to support the findings and the law is clear in support of the conclusion.

---

[4]There were lodged with the clerk of the court below and there were or will be forwarded to the clerk of this court for this court's use, a number of documents of the contents of which, judicial notice may be taken. These documents are the following:

1. Selected Data on the Occupation of Japan, official publication of Supreme Commander for the Allied Powers (SCAP), 1950.
2. Political Reorientation of Japan (2 Vols.). Official Report of Government Section, SCAP (1950).
3. Extracts from No. 17, Summation of Non-Military Activities in Japan (SCAP, February, 1947).
4. Extract from Unclassified State Department document dated May 5, 1950, subject: Material regarding Japanese elections, from Yokohama to the Department.
5. Deposition of Justin Williams, Chief of the Parliamentary and Political Division of Government Section, SCAP.
6. Extract from Deposition of Kiyoshi Togasaki, editor of the Nippon Times, English language paper published in Tokyo.

(Continued on following pages)

On January 12, 1946, General MacArthur, through his Adjutant General, ordered the holding of the elections [Pltf. Ex. 2, pp. 25, 136]. The elections could only be held if, when and in accordance with the wishes of SCAP [*Ibid,* pp. 25, 138]. And if the *results* were not satisfactory to SCAP, he could order the elections set aside and new elections held [*Ibid,* pp. 25, 139]. In his statement *approving* the results of the elections, General MacArthur pointed out that one of the main reasons the directive ordering the election was issued was "to evaluate political thinking of the Japanese people" [*Ibid,* 142].

Some or all of the documents referred to above, depending upon their availability at the time of trial, were introduced and received in evidence in numerous cases, involving the issues of this case. The following are cases in the United States District Court for the Southern District of California wherein they were received and are a part of the records of these cases:

Furuno v. Acheson, 94 Fed. Supp. 358;
Kai v. Acheson, 94 Fed. Supp. 383;
Rokui v. Acheson, 94 Fed. Supp. 439;
Seki v. Acheson, 94 Fed. Supp. 438;
Yada v. Acheson, 94 Fed. Supp. 438;
Kuwahara v. Acheson, 96 Fed. Supp. 38.

As to the official publication of SCAP and the official communique from the Yokohama office to the Department, numbers 1 through 4 above, it is clear that this court may take judicial notice of their contents by reason of that fact alone. As to the depositions, items 5 and 6, they being part of the records of district courts within the circuit of the court below (and having been admitted in evidence without objection; the Williams deposition indeed being taken by the Government) notice may be taken thereof as well. These principles are substantiated in the following cases.

N. L. R. B. v. E. C. Atkins Co., 331 U. S. 398, 406, where this court took judicial notice of the contents of a circular issued by Headquarters, Army Service Forces. The court said:

"Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military au-

On these facts the trial court concluded that:

> "The elections conducted in Japan in 1946 and 1947 where polls, in that they were merely expressions of the desires or wishes of the Japanese people, but not the exercise of a command by then that certain candidates for office shall hold public office; nor were said elections a command by the Japanese people which they were capable of enforcing that certain persons should hold certain public offices."

and he held, therefore, that the elections were not political elections within the meaning of 8 U. S. C. 801(e).

In this holding the trial court and not the court below is sustained by law and reason.

It is to be noted that the statute itself distinguishes between a political election and a plebiscite.

---

thorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co. v. Johnson,* 316 U. S. 481, 483, 484."

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368, 375, where the court took judicial notice of a practice in the administrative office of the United States courts; *Tempel v. United States,* 248 U. S. 121, 126, where the court took judicial notice of the contents of reports of the Secretary of War. In *Standard Oil Co. v. Johnson,* 316 U. S. 481, 483, 484, the court took judicial notice of an order of Army Headquarters establishing post exchanges.

That this is the view of the Government is seen from its brief in *Hirabayashi v. United States,* 320 U. S. 81, where at page 11 it is said that "facts (appearing) in official documents . . . are peculiarly within the realm of judicial notice" citing many cases. Respondent in this case is in accord. (Appellant's Brief, page 23, below.)

See also as to the right to notice the facts revealed by the records of the District Court: *Savage v. U. S. District Court,* 144 F. 2d 575 (C. C. A. 9, 1944); *Armstrong v. Alliance Trust Co.,* 126 F. 2d 164, 167 (C. C. A. 5, 1942). And compare *Falbo v. United States,* 320 U. S. 549, footnote 7.

And it has been held that voting in Canada pursuant to an Act of Canadian Parliament as to whether Canada should join in with the United States in World War I was, because there was no finality, not a political election but a mere plebiscite. And it being not for the purpose of determining sovereignty over foreign territory, an American citizen who voted therein did not lose his citizenship. (*Matter of H,* 1 Administrative Decisions under Immigration and Nationality Laws of the United States 239, cited I & N).

Not only did the trial court hold that the elections were "merely the expression of a wish, or at best, merely a plebiscite" [R. 22], but Dr. Justin Williams, Chief of the Political Division, Government Section of SCAP, used the same language. Thus he said in describing the elections:

> "In this case, it was an expression of public opinion." [Williams Deposition 23.]

And again [p. 29]:

> "The election was intended to be, among other things, a plebiscite."

The similarity in language used by the trial court and Dr. Williams is striking because the deposition was not known to the court. It was simply a case of the facts clearly calling for such description.

Both the trial court and Dr. Williams are supported by authority.

In *Newberry v. United States,* 256 U. S. 232, 249, the court said:

> ". . . the word (election) now has the same general significance as it did when the Constitution came into existence,—*final* choice of an officer by the duly qualified electors." (Italics added.)

In accord is *Commonwealth v. Likely,* 267 Pa. 310, 110 Atl. 167:

> "An election is the embodiment of the popular will, the expression of the *sovereign power of the people.*" (Italics added.)

And compare this principle from *Matter of H,* 1 I & N, 239, 242:

> "Judicial and legalistic definitions of the term 'election' uniformly emphasize as essential the element of *determinateness* . . .
>
> "The basic essential of an election in our governmental procedure is thus, *its finality of decisiveness*—until the next election." (Italics added.)

In view of General MacArthur's admitted power to set aside the whole proceeding [Pltf. Ex. 2, pp. 138-140] even in the view of the Department of Justice (*Matter of H*), the "elections" in Japan cannot be considered to have been the kind of elections that were within the contemplation of Congress.

The conclusion here argued for becomes even more obvious when it is considered that expatriation laws, being highly penal, must be strictly construed (*In re Wildberger,* 214 Fed. 508, 509 (D. C. Ed. Pa. 1914). *Cf. Perkins v. Elg,* 307 U. S. 325, 337; *Schneiderman v. United States,* 320 U. S. 120).

III.

At the Time of the Elections in 1946 and 1947, Japan Was Not a Foreign State Within the Meaning of 8 U. S. C. 801(e).

Here again if Japan at the time of the elections involved was not a foreign state within the meaning of the act, one of the essential elements is missing, petitioner cannot be held to have expatriated herself and the lower court's judgment must be reversed.

The opinion of the lower court spends little time on the question [R. 132]. The trial court, however, made extensive findings [R. 31-42] as to the nature of Japan and its administration by General MacArthur to further the objectives of the United States.

It is submitted that one simply cannot read the material [Pltf. Exs. 2, 5 and 6 and the documents mentioned in footnote 4, *supra*, pp. 15 to 17; all, with the exception of the Togasaki deposition, of United States Government origin and about which there is no conflict] without coming to the conclusion that the Japan of 1946 and 1947 where petitioner voted was simply not, it just could not be, the kind of a place Congress intended when it used the phrase "foreign state."

This conclusion is supported by applicable law.

> "Thus in 1 Moore, *Digest of International Law*, 12 *et seq.*, is found this definition from 1 Phillimore, 3d Ed. *International Law*, p. 47:
>
> "For all purposes of international law, a state may be defined to be a people permanently occupying a fixed territory, bound together by common laws, habits, and customs into one body politic, exercising through the medium of an organized government, in-

dependent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all international relations with the other communities of the globe."

It quickly becomes apparent that Japan in 1946 and 1947 did not fit this definition. For example, it cannot be said that it exercised *independent sovereignty,* nor that it was capable of making war and peace, nor that it was able to enter into all international relations with the other communities of the globe.

The Japanese Government had no independence. What it did or did not do was solely controlled by SCAP in order to carry out the objectives of the United States [Pltf. Ex. 2, p. 74].

". . . to permit the Japanese Government to continue official relations with other governments through its diplomatic and consular representatives abroad and through foreign representatives in Japan would have been inconsistent with Japan's position as a defeated and occupied power and incompatible with the Supreme Commander's authority . . ." (SCAP, Political Reorientation of Japan, 1.)

"From any objective point of view there should have been no further question that the relations of the Allies with Japan rested on an unconditional surrender, not on a contract . . ." (*Ibid.*, 5.)

"The authority given to the Supreme Commander to carry out his mission under Allied policy directives was supreme and clearly not subject to question on the part of the Japanese as to its scope. True, he was instructed to exercise control of Japan through the

Japanese Government to the extent that this proved satisfactory for his purpose, but this did not prejudice his right to act directly, or to use force, if necessary . . . " (*Ibid.*, 5.)

"By the end of December, 1945, the Japanese Government had no relations with the outside world except through the Supreme Commander, and arrangements were being made for the repatriation of Japanese representatives in foreign countries." (*Ibid.*, 7.)

Indeed, even the United States representatives in Japan were a part of SCAP and had no relationship with the Japanese Government (Selected Data, 164).

Similarly does this definition from 1 Hackworth, *Digest of International Law* 47, sustain petitioner's position:

"The term state . . . connotes, in the international sense, a people permanently occupying a fixed territory, bound together by common laws and customs into a body politic, possessing an organized government, and *capable of conducting relations with other states.*" (Italics added.)

And compare this definition to which the United States has agreed at the convention between the United States of America and other American Republics on the Rights and Duties of States, signed at Montevideo, Uruguay, on December 26, 1933 (49 Stat. 3097; Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers, Vol. 4, p. 4807):

(Article I): "the state as a person of international law should possess the following qualifications:

> (a) a permanent population; (b) a defined territory; (c) government, and (d) *capacity to enter into relations with other states.*" (Italics added.)

It is thus clear that Japan under the occupation in 1946 and 1947 did not measure up to the required standards.

What the authorities just quoted have stated to be the law has also been so stated by this court in *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, 8 L. Ed. 25, 31:

> "They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them would be considered by all as an invasion of our territory, and an act of hostility."

There is other authority to like effect. For example, on the issue of foreign state it has been held that the Philippine Islands was not a "foreign country" (*Dant & Russell v. Board of Supervisors of L. A. County,* 21 Cal. 2d 534 (1943). In *The Lucy H.* 235 Fed. 610, 614 (D. C. N. D., Fla., 1916), it was held that "a 'state or nation' denotes a political community organized under a distinct government *recognized and conformed to by its citizens and subjects as the supreme power.*" (Citing *The Three Friends,* 166 U. S. 54.) (Italics added.)

Stressing the need for sovereignty is the case of *Spelor v. United States,* 171 F. 2d 208, 210 (C. A. 2, 1948).

Compare General MacArthur's testimony before the Senate Foreign Relations and Armed Services Committee on May 3, 1951:

> "For five years and a half, *I have had to govern Japan.* I was provided, by the nations concerned—*I—as the sole executive authority for Japan . . .*" (Italics added.) (L. A. Times, May 4, 1951, p. 3, col. 3.)

The situation in Japan at the time involved was not the usual case of a mere military occupation. If it had been just that, a different problem might arise. But it was much more. The United States, in fact, became Japan and we made over that land in accordance with our wishes and to support the objectives of this country [Plf. Ex. 2, p. 74]. In the words of the trial court, "they just practically clean out the entire Japanese Government" (p. 19).

The usual role of a military occupant is described in II Oppenheim, International Law (6th Ed. 1944), Section 166, page 342.

> "But, although as regards the safety of his army and the purpose of war the *occupant* is vested with an almost absolute power, *as he is not the sovereign of the territory he has no right to make changes in the laws or in the administration,* other than those which are temporarily necessitated by his interest in the maintenance and safety of his army and the realization of the purpose of the war. *On the contrary, he has the duty of administering the country according to the existing laws and he must insure public order and safety; must respect family honor and rights, individual lives, private property, religious convictions, and liberty.*" (Italics added.)

To say that our occupation forces made no changes in the laws or in the administration, or to say that General MacArthur administered the country according to the existing laws, or that private property or religious convictions were respected in the sense that the above quote is meant, is simply to ignore that which is obvious and that which the State Department has publicly, and properly of course, announced has been done.

Thus, for example, and with no attempt to be exhaustive, at least these changes were wrought in Japan by directive [Pltf. Ex. 2, pp. 15, 16] of the Supreme Commander all for the purpose of carrying out United States' Objectives in Japan [Pltf. Ex. 2, p. 54; Selected Data, 17]:

1. SCAP directive ordered the establishment of a Japanese "Bill of Rights" in order to remove restrictions on political, civil and religious liberties and discriminations on the grounds of race, nationality, creed or political opinion [Pltf. Ex. 2, pp. 19, 94-980].

2. Undesirable persons were removed from public office and over 200 political parties, associations, societies and other organizations were ordered abolished [Pltf. Ex. 2, pp. 12, 20, 99-112; Selected Data, 80].

3. SCAP directed as to how large the internal police force could be [Pltf. Ex. 2, p. 99].

4. SCAP directed a "liberalization of the constitution" which in effect amounted to the promulgation of a new constitution for Japan [Pltf. Ex. 2, pp. 20, 21] which had to be first approved by the Supreme Commander before it was even published to the people [Pltf. Ex. 2, pp. 21, 132].

5. SCAP ordered the 1946 and 1947 elections to be held [Pltf. Ex. 2, pp. 25, 136; Williams Depositions, 22] with power to set them aside if he did not approve [Pltf. Ex. 2, p. 139] and which had to be and were approved by him before they were valid [Pltf. Ex. 2, p. 140; Selected Data, 1] and the candidates in which had first to be approved by SCAP [Pltf. Ex. 6, p. 9].

6. SCAP forbade the domestic use of silk or silk-mixed goods and rescinded the Japanese Government's order *re* reduction of the silk crop [Pltf. Ex. 2, p. 39].

7. SCAP issued directives encouraging the growth of labor unions [Pltf. Ex. 2, p. 44; Selected Data, 71].

8. SCAP initiated a complete land reform program designed to improve the economic and social status of farmers (Selected Data, 42).

9. SCAP permits Japan to maintain no air service (Selected Data, 65).

10. The entire business and economic system of Japan has been reorganized by SCAP (Selected Data, 69).

11. Radio services are operated only under a code promulgated by SCAP (Selected Data, 75, 76).

The above recitals represent only some of the things SCAP has done publicly which show that this is not a mere military occupation.

To say that this land where the United States did these things was a foreign state within the meaning of 8 U. S. C. 801(e) to deprive petitioner of her citizenship is, it is submitted, unwarranted, unsound and an inappropriate interpretation of the statute.

IV.

Petitioner Did Not Act Voluntarily and Therefore Cannot Be Adjudged to Have Lost Her United States Citizenship.

It is, of course, the law that if one performs an act involuntarily, which, had it been voluntary would result in loss of citizenship, no loss of citizenship is effected. (*Perkins v. Elg,* 307 U. S. 325, 334; *Dos Reis v. Nicolls,* 161 F. 2d 860, 868.) The lower court recognized this, but held that the trial court, who had observed the petitioner on the stand, under oath and was thus in a position to judge the effects of conditions in Japan on *this* petitioner, was "clearly erroneous" when it found that petitioner had acted involuntarily [R. 136]. It is submitted that in so holding, the lower court acted contrary to the mandate of Rule 52a, Federal Rules of Civil Procedure. On this finding of fact, respondent here, appellant below, failed to make a "very obvious and exceptional showing of error." (*Graver Mfg. Co. v. Linde Co.,* 336 U. S. 271, 275.) Not having done so, the trial court's judgment on this fact issue should not have been reversed.

The solution of this problem requires an appreciation that what may be "voluntary" to one person, may, under precise circumstances, be "involuntary" as to another person. The solution of the problem also requires an apprehension that human beings are social creatures and that oft-times, to certain persons—for example, petitioner —social pressures are overwhelming and cannot be denied. There must also be taken into consideration that a judgment of loss of United States citizenship is a deprivation of the most precious possession man today has. Accordingly, *all* the surrounding circumstances, including their effect on this petitioner—which only the trial court could

judge—must be taken into account. This, the lower court failed to do.

This court has recognized the precious right of our citizenship and that it may not be "lightly revoked." (*Schneiderman v. United States,* 320 U. S. 120, 125.) Also this court has said "Rights of citizenship may not be impaired by an ambiguity." (*Perkins v. Elg,* 307 U. S. 325, 337.)

Accordingly, a consideration of why petitioner voted and the social setting—the gestalt—in which she found herself, is in order.

Prior to the occupation of Japan, women were not allowed to vote at all [R. 70, Pltf. Ex. 5, Sec. 30], and the voting age for men was 25 [Pltf. Ex. 5, Sec. 30; Williams Deposition, 14]. This was changed by directive of General MacArthur. For the first time in the history of Japan women were permitted to vote [R. 70, Pltf. Ex. 2, pp. 25, 26] and the voting age was lowered to 20 [Pltf. Ex. 2, p. 25; Williams Deposition, 14]. Thus, were it not for this order of SCAP, petitioner would not have even been in a position to vote. The situation was such that the minds of the inhabitants, including petitioner were adjusted to the realization that the occupation authorities were all-powerful and to displease them would result in grave consequences.

On January 12, 1946, General MacArthur, through his Adjutant General, issued the directive ordering the first election [Pltf. Ex. 2, pp. 25, 136].

Prior to the general elections of April 10, 1946, authorized agencies of the Headquarters encouraged the Japanese press, radio and other information dissemination media to encourage election participation by eligible voters.

In pre-election reports the press emphasized the election's importance and the imperative need for participation by all voters and declared that the world was watching the Japanese election and that those who refrained from voting were "enemies of the people." (Political Reorientation, 370.)

A clear picture of the intensive program carried out by the occupation forces to stimulate participation in the election is seen.

The United States Military Government throughout the country used the press and published open letters designed to stimulate and induce the people to vote. Typical is this release by Lt. Col. Timothy J. Ryan, Commander of the Saitama Military Government Team:

> "The voters have no right to delegate their power of selection to any small group. If they do this, they are failing to meet their obligations and deserve what may befall them, non-representative government. Let every man and woman who has the vote, exercise that right and make the coming election a truly democratic one." (Political Reorientation, 372.)

The occupation forces closely surveilled the election by the use of military government teams at practically every polling place in Japan and that they would so do was widely publicized [Pltf. Ex. 5, Secs. 21, 23, 24; Williams Deposition, 6, 17].

The emphasis everywhere was that everyone must vote; it was an all-out campaign on all fronts [Political Reorientation, 374, 376; Togasaki Deposition, 1, 3, 4]. Special attention was given to the women [Pltf. Ex. 6]. No distinction was made between Nisei or Issei [May 5,

1950, State Dept. Document, 1, 2; Williams Deposition, 21; Togasaki Deposition, 5]. Indeed it was not until a few days before the 1947 elections that any notification of any sort was issued by the occupation forces that Nisei should not vote because of the danger that they might lose their United States citizenship [May 5, 1950, State Department Document 1 and enclosures]. And, significantly, when petitioner learned of this, she no longer voted [R. 69].

It is against this background of social pressure brought about by the occupation forces on people who had been enslaved for 300 years [Pltf. Exs. 2, 26] that petitioner's actions must be viewed. Her reasons as to why she voted are lucid:

> "After the war ended, General MacArthur and the occupational forces had granted the women in Japan for voting; and to vote I thought it would help the cause of democracy in Japan. It was repeated and emphasized again and again by the occupation forces, and therefore I thought it was my duty to vote." [R. 70.]

In a statement given to the American Consul in Japan, she said:

> "After the termination of war, here, in Japan, there came into effect the Women's Suffrage through which the women were given the chance to participate in the democratic future of Japan and, at the time of the elections, I constantly read much in the newspapers and other publications in addition to election guidance programs over the radio, that were sponsored by the Central Government of Japan and Occupational Authorities from the offices of the Supreme Commander, Eighth Army, and Military Gov-

ernments, that it was absolutely essential that every woman of voting age in Japan should turn out at the pools (*sic*) thereby positively asserting themselves as voters and exponents of democracy. So I, in total ignorance of the existence of the Nationality Act, but with a view toward exercising my ideas with respect to democratic practices, voted in the same way as the Japanese women citizens, not realizing for a moment that by so doing, I was in effect, relinquishing my American citizenship. It was only through the so convincing approach of occupation force voting drives and no talk of we few 'orphan Americans' or instructions to us, that prompted me to participate in the great democratic spirit which engulfed everyone at the time." [R. 74 and 75.]

The following also appears in the record [R. 90]:

"The Court: Did you discuss it with your aunt? The Witness (Through the interpreter: They accented that since we women had a right to vote that we should vote. That is about all I talked about it.

The Court: Everyone was talking to everyone else concerning the women voting?

The Witness (Through the interpreter): Yes.

Q. (By Mr. Belcher): Women had not been permitted to vote before that time? A. (Through the interpreter): No, they wasn't."

Again [R. 92]:

"Why did you vote in the local elections?

The Witness (Through the interpreter): Because the occupational forces emphasized to vote."

And [R. 93]:

"Did you hear the appeal that was made by radio to vote? A. (Through the interpreter): Yes, by the radio and by the newspapers.

Q. There was nothing said in any of that radio propaganda that you heard that appealed to Japanese of American birth to vote in those elections, was there? A. (Through the interpreter): No, I didn't hear anything like that.

Q. So that, at the time you voted, you did so as a Japanese citizen, did you not? A. (Through the interpreter): My parents were in America and I have American citizenship but, according to General MacArthur, his instructions were that everybody in Japan should vote; therefore, I thought it was my duty to vote.

The Court: All Japanese?

The Witness (Through the interpreter): Everybody in Japan."

Similarly [R. 95]:

"Therefore, my intention of voting at that time was to help the occupational forces.

Q. Did you know that the occupational forces represented eleven nations? A. (Through the interpreter): I thought it was only America."

At the polling place, petitioner saw American soldiers [R. 97].

To petitioner, General MacArthur meant the person who brought peace to Japan and who represents President Truman [R. 98].

A. What Is "Voluntary?"

Because of the delicacy of the problem, much has been said by this and other courts. It is submitted that the lower court's holding as "clearly erroneous" the trial court's finding of involuntariness is itself a grievous error. In so doing the lower court failed to apprehend the tremendous pressures extant at the time and their effect on this petitioner. The trial court observed petitioner; the lower court did not.

It is submitted that the lower court's ruling is inconsistent with the decisions of this court bearing on the point; as well, indeed as with other decisions of the lower court itself.

Thus in *Acheson v. Murakami,* 176 F. 2d 953, 955, the lower court properly recognized situations short of fear of physical injury as appropriate factors contributing to making an alleged expatriation involuntary. The court there apprehended that pressures exerted by this Government, upon the minds of Americans of Japanese descent, contributed to a totality of facts, in the context of which, abandonment of United States citizenship was involuntary. In the instant case, the lower court ignored the pressures exerted by the United States, through United States Occupation troops, upon the petitioner—pressures found by the trial court to have induced the plaintiff involuntarily to vote [R. 30].

Ignoring these pressures, the lower court decided the instant case in a "judicial vacuum"[5] and in conflict with the application of judicial realism by the court in *Murakami.*

It is noteworthy that in *every* instance, where the trial courts have observed the plaintiffs their decisions were at variance with that of the lower court whose decision on this fact question is necessarily based on the cold written record. Thus in a case decided *after* the decision of the lower court in the instant case and with knowledge of the decision, one of the very judges on whom the lower court relied for its holding on the "political election" and "foreign state" issues came to the conclusion that the plaintiffs in that case had voted involuntarily. In *Nakashima v. Acheson,* 98 Fed. Supp. 11, Judge Byrne, who had decided the *Kuwahara* case, 96 Fed. Supp. 38, said:

> "Here the plaintiff voted because she feared the result if she refrained from voting. The occupation authorities were bringing intense pressure on the Japanese people in a laudable effort to induce them to participate in the democratic process and to exercise their right of suffrage."

The trial judge there, upon evidence substantially similar to that in the instant case, could not close his eyes to the role of the United States Government in the Japanese elections, the pressures exerted by the Occupation

---

[5]The phrase is not ours, it is that of Chief Justice Hughes in *NLRB v. Jones & Laughlin,* 301 U. S. 1.

Forces and the resultant involuntariness of Americans of Japanese descent voting under such pressures. Said Judge Byrne:

> "A voluntary act is an act proceeding from one's own choice or full consent *unimpelled by another's influence*. To determine whether an act is voluntary, the trier of fact must examine all relevant facts and circumstances which might cause the actor to depart from the exercise of free choice and respond to compulsion from others. In these Japanese voting cases, the conditions, as well as the nature of the government existing in Japan at the time, are of great importance. The elections were ordered by General MacArthur under the new law guaranteeing the vote to women. An intensive campaign was conducted by the occupation authorities to stimulate participation in the elections and to encourage all the inhabitants to take part in the democratic process. Those who worked at cross purposes were considered to be in sympathy with the officials who had been purged by the occupation authorities. The radio pronounced that the world was watching the Japanese elections and that those who refrained from voting were enemies of the people." (Italics added.)

And he concluded that under these circumstances, there had been no voluntary conduct. The cases are many, especially since the harsh days of the common law, which have recognized that pressures other than physical, but rather social, moral or psychological, are sufficient to relieve a person of his physical act because of their play

and effect upon his actual free will. That is, that despite the appearance of freedom, the individual actually finds himself in a position where his will is not his own. See, for example: *The Eliza Lines,* 199 U. S. 119, 130-131; *Atchison etc. Ry. v. O'Connor,* 223 U. S. 280; 17 Am. Jur., Duress & Undue Influence, Sec. 7; *Young v. Hoaglund,* 212 Cal. 426.

This court has recognized that under circumstances which in their effect are not unlike those prevailing here, acts performed because of the force of the spirit were not acts that were voluntary. For example, see *Watts v. Indiana,* 338 U. S. 49.[6] It will be recalled that petitioner testified that she voted because of the force of the spirit [R. 82]. The trial court who had the opportunity to observe petitioner, credited this testimony; the lower court, from the cold record, did not.

Webster's New International Dictionary (Unabridged), second edition, 1949, defines "voluntary" as follows:

> "Proceeding from the will, or from one's choice or full consent; produced in or by an act of choice; as, voluntary action.
>
> (2) Unconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself or itself; free . . ."

The facts related above as to the *"gestalt"* of the situation in Japan and petitioner's being engulfed by them

---

[6]A good discussion of the meaning of "voluntary" in relation to a case such as this appears in the *Uyeno* decision, 96 Fed. Supp. 510, 517-520.

[R. 95, 93, 92, 90, 75, 74] clearly show that petitioners act was not "unimpelled by another's influence, spontaneous," etc.

It is not suggested, of course, that the action taken by the occupation authorities to induce everyone to vote and the fact that even they failed to realize that they were inducing many American citizens to so do, was improper. On the contrary, the results of the program on the democratization of Japan can only be considered as gratifying. But this does not alter the facts as they existed nor the fact that petitioner's voting was not her free and voluntary choice.

Here, as in the other cases (*e. g., Kuwahara,* 96 Fed. Supp. 38, 43) the petitioner "was caught up in this wave (of occupational pressure) and carried along with it. (S)he voted because (s)he thought (s)he was required[7] to vote and *feared* the result if (s)he disregarded the admonition and urging of the occupation authorities. (Her) action was impelled by the influence of those who (s)he recognized as exercising supreme power and was not voluntary."

So here.

---

[7] *Cf.* her testimony that she thought "it was absolutely essential" [R. 75] that she vote and that it was her "duty" [R. 93] to vote.

V.

The Loss of Citizenship Provided for in 8 U. S. C. 801(e) Refers to a Situation Showing a Shift of Allegiance and a Real Attachment to a Foreign Country. It Was Not Intended to Effect Expatriation Where the Citizen Was Acting for This Country and in Furtherance of Its Objectives.

It is clear that at all times petitioner here was not acting at cross purposes to this country nor contrary to the wishes of our occupation forces in Japan. Indeed there is presented in this case the incongruous and paradoxical situation of petitioner doing everything our own representatives asked and wanted her to do and then, by reason thereof, of being visited with the terrible punishment of expatriation and probable permanent separation from her brother and parents.

It would seem manifest that this is not the kind of case Congress had in mind when it passed the legislation. On the contrary, what Congress had in mind was a situation calling for a shift of allegiance—a situation showing that the subject's real attachment is to a foreign country and not to this one.

As reported by the president's Cabinet Committee to Congress in connection with drafting of 801 U. S. C. 801(c), Section 401(c) of the Nationality Act of 1940):

> "None of the various provisions in the Code concerning the loss of American nationality . . . is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their

> own acts, or inaction, *show that their real attachment is to the foreign country and not to the United States.*" (Italics added.) (The foregoing is quoted in *Dos Reis,* 161 F. 2d at page 863.)

The *Dos Reis* case (161 F. 2d at page 863) has a further quotation from the explanatory comment of the president's cabinet committee as follows:

> "This provision is based upon the theory that an American national who, after reaching the age of majority (see proviso (2) to this section, *infra*) *voluntarily* enters, or continues to serve in, the army of a foreign state, *thus offering his all in support of such state, should be deemed to have transferred his allegiance to it.*" (Italics added.)

It is manifest, accordingly, that the critical question is whether the person involved offers his all in support of a foreign state, thus, transferring his allegiance to it.

The same view substantially, is expressed in *Doreau v. Marshall,* 170 F. 2d 721, 724, the test being, as the Third Circuit Court of Appeals pointed out, whether there is an *"authentic abandonment of his own nationality. His act, if it can be called his act, is involuntary, he cannot be truly said to be manifesting his intention of renouncing his country."* (Italics added.)

To the same effect is the following statement by Representative Rees, Chairman of the House Committee, during the course of debate in Congress:

> "Not only do the nationality laws need clarifying and orderly arrangement in a single code, but substantive changes are necessary in connection with certain rights, with a view to preventing persons *who have no real attachment to the United States* from enjoy-

ing the high privilege of American nationality." (Italics added.) (Congressional Record, Vol. 86, 76th Congress, 3rd Session, p. 1, 1948.)

In short, the real question is one of allegiance.

"A change of the allegiance due to the United States, a throwing of it off in the part of a citizen, involves on the part of the government an acquiescence from that department of government which, according to its constitution, must acquiesce in it; *and, on the part of the citizen, the manifestation of the purpose to expatriate* himself by some unequivocal act, which act must also be recognized by the government to be adequate for that purpose." (*Comitis v. Parkerson* (C. C. La. 1893), 56 Fed. 556, 558.) (Italics added.)

The incongruity of visiting punishment upon one like petitioner here for performing an act under the mistaken belief that he is cooperating with this country was recognized in the *Nakashima* case (*supra,* 98 Fed. Supp. at 12.)

That incongruity the lower court has, it is submitted, by its decision herein, written into the law.

This incongruity is impliedly recognized by the State Department itself. Thus, in an official memorandum from the United States Consul at Yokohama to the State Department in Washington, D. C., on the subject, "Material Regarding Japanese Elections"[8] it is reported that:

"Consular officials stated that because of a desire to assist in establishing a democratic government in Japan, considerable number of American citizens of

---

[8]The text of the entire memorandum is available to this court. It is one of the documents filed with the clerk referred to in footnote 4, *supra,* pp. 15 to 17.

> Japanese ancestry—those with dual nationality—voted in the last election on April 10, 1946, without realizing that by so doing they forfeited their American citizenship."[9]

Here then is an implicit recognition by the State Department itself of the manifest unfair position in which a large number of American citizens of Japanese ancestry found themselves by virtue of voting in the Japanese elections, through no fault of their own.

Further evidence of a sympathetic understanding of the position of these Americans may be seen from the document entitled "General Headquarters Far Eastern Command" which is attached as enclosure No. 9 to the same report. A quotation follows:

> "6. Allied instructions that elections be held in 1946 and 1947 also bear on the problems of influence upon voters. Numerous applicants have complained that statements by GHQ officials and by Military Government officials resulted in strenuous efforts by local Japanese authorities to turn out a large vote; these efforts are alleged in some cases to have involved threats to cut off food rations from persons who did not vote. It is claimed that Allied instructions created a state of mental confusion in many cases, so that voters felt they were voting as a result of Occupation requests, and that the sum total

---

[9]The full text of the newspaper release, a part of the document hereto referred to on file with the Clerk of this court, is set forth as Appendix A to this petition.

> of efforts to produce a large vote resulted in a state of 'social duress' inducing everyone to vote. . . .[10]

And so it is clear that the statute can not be intended to cover the situation at bar. We have suggested above that what happened here is something akin to entrapment. Imposition of loss of citizenship under such circumstances should not be permitted by this court.

Conclusion.

The Petition for Writ of Certiorari should be granted, the lower court's decision reversed and the judgment of the trial court reinstated.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioner.

---

[10]It is to be noted that the report referred to was made to the State Department by General Headquarters Far East Command as distinguished from a report by the Supreme Commander of the Allied Powers. The Far East Command is exclusively an agency of the United States Army, consisting of the U. S. 8th Army. (See document on file with the Clerk of this court published by General MacArthur's headquarters and entitled "Selected Data on the Occupation of Japan," page 131 (Chart 4).)

APPENDIX "A."

UNCLASSIFIED

Enclosure No. 2 to Despatch No. 153 dated May 5, 1950, from Yokohama

NIPPON TIMES, Wednesday, April 2, 1947

WARNING GIVEN NISEI NOT TO VOTE IN JAPAN

U. S. Consulate Issues Advice to Protect Citizenship

By the United Press

American consular officials in Yokohama advised American citizens of Japanese ancestry residing in Japan they will forfeit their American citizenship if they voted in the Japanese political elections scheduled this month.

Consular officials stated that because of a desire to assist in establishing a democratic government in Japan, considerable number of American citizens of Japanese ancestry—those with dual nationality—voted in the last election on April 10, 1946, without realizing that by so doing they forfeited their American citizenship.

While urging American citizens of the Japanese race residing in Japan—there are approximately some 15,000—to continue to use their knowledge of American democratic principles to assist the Occupation forces and the Japanese people in establishing democracy in Japan, consular officials expressed the hope that such persons would be informed that under the United States nationality laws voting in a political election in a foreign state is one of the ways American citizenship can be lost.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and constitutional provisions involved	3
Statement	3
Argument	8
Conclusion	19

CITATIONS

CASES:

Acheson v. *Murata*, No. 422, this Term	18
Acheson v. *Okimura*, No. 421, this Term	18
Doreau v. *Marshall*, 170 F. 2d 721	15
Dos Reis v. *Nicolls*, 161 F. 2d 860	15
Hirota v. *MacArthur*, 338 U. S. 197	9
Jones v. *United States*, 137 U. S. 202	10
Kuwahara v. *Acheson*, 96 F. Supp. 38	11
MacKenzie v. *Hare*, 239 U. S. 299	16, 19
Moser v. *United States*, 341 U. S. 41	16
Neely v. *Henkel (No. 1)*, 180 U. S. 109	9
Ouye v. *Acheson*, 91 F. Supp. 129	15
Pearcy v. *Stranahan*, 205 U. S. 257	10
Rokui v. *Acheson*, 94 F. Supp. 439	16
Savorgnan v. *United States*, 338 U. S. 491	16
Seki v. *Acheson*, 94 F. Supp. 438	16
Tsunashima v. *Acheson*, 83 F. Supp. 473	15
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304	10
Uyeno v. *Acheson*, 96 F. Supp. 510	10, 13, 16
Vermilya-Brown Co. v. *Connell*, 335 U. S. 377	10, 11
Williams v. *Suffolk Ins. Co.*, 13 Pet. 415	10
Yamamoto v. *Acheson*, 93 F. Supp. 346	16

CONSTITUTION AND STATUTES:

Constitution of the United States, Amendment XIV	3
Nationality Act of 1940, Section 401(e), (c) 54 Stat. 1168-1169, 8 U. S. C. 801(e), (c)	3, 11, 14, 17, 18

MISCELLANEOUS: Page

1 Hackworth, *Digest of International Law* (1940), Sec. 25, p. 127 9
Hearings before Committee on Immigration and Naturalization on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st sess., 405, 490-491 14
Hyde, *International Law* (2nd rev. ed. 1945), Sec. 7, pp. 22-23 . . 9
Potsdam Proclamation of July 26, 1945, reprinted in *Occupation of Japan, Policy and Progress*, Department of State Publication 2671, Far Eastern Series 17 8
Political Reorientation of Japan 11, 12
Reply by General MacArthur to Far Eastern Commission on Timing of Elections, March 29, 1946 12-14
United States Initial Post-Surrender Policy for Japan, August 29, 1945, p. 75 12

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 492

MARIKO KUNIYUKI, *Petitioner*

v.

DEAN ACHESON, as Secretary of State of the United States of America

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 130-137) is reported at 189 F. 2d 741. The opinion on rehearing (R. 140-141) is reported at 190 F. 2d 897. The opinion of the District Court (R. 8-25) is reported at 94 F. Supp. 358. The findings of fact and conclusions of law of the District Court appear at R. 28-44.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1951 (R. 138). A petition for rehearing was denied on July 27, 1951 (R. 139). By order dated October 16, 1951, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including December 24, 1951 (R. 143), and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, within the meaning and intent of Section 401(e) of the Nationality Act of 1940, providing for loss of United States nationality by voting in a political election in a foreign state, Japan was a foreign state in 1946 and 1947.

2. Whether, within the meaning and intent of Section 401(e) of the Nationality Act of 1940, elections held in Japan in 1946 and 1947 under orders and at the instance of General Douglas MacArthur, Supreme Commander for the Allied Powers, were political elections.

3. Whether the expatriation provision of Section 401(e) is inapplicable in view of the official encouragement of the election by United States occupation officials, and the fact that petitioner, in voting, desired to carry out the objectives of the United States in Japan.

4. Whether Section 401(e) of the Nationality Act of 1940 is constitutional.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV, provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States * * *.

Section 401(e) of the Nationality Act of 1940, 54 Stat. 1168-1169, 8 U.S.C. 801(e) provides:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory * * *.

STATEMENT

Petitioner was born in Seattle, Washington, in 1916 (R. 49) of Japanese parents. When she was three years old, she was taken by her parents to Japan (R. 54). Her parents returned to the United States after seven months (R. 54), and left petitioner with relatives so that she might be edu-

cated in Japan (R. 55). Petitioner did not thereafter come to the United States until 1940 (R. 56), when she came here for a period of eight months. Her testimony was that when she came here in 1940, she intended to remain here permanently (R. 57), and that her return to Japan in the summer of 1941 was to make one last visit to her aunt "prior to permanently settling in the United States" (R. 74). After a few months in Japan, petitioner "decided to return to my home in Seattle but was not permitted to do so as Japan was controlled by militarists. Thus, I was detained in Japan throughout the war" (R. 74).

The petitioner voted in six Japanese elections, including the general elections of April 1946 and April 1947 (R. 30). As a result, the United States consulate determined that petitioner had expatriated herself and refused to register her as a national of the United States (R. 4, 6, 130-131) or to issue her a passport (R. 30). Petitioner thereupon caused this action to be commenced in the United States (R. 3).

Petitioner was the only witness in her own behalf and she frankly admitted voting in the Japanese elections of 1946 and 1947 (R. 67-69). She testified:

> After the war ended, General MacArthur and the occupational forces had granted the women in Japan for voting; and to vote I thought it would help the cause of democracy

> in Japan. It was repeated and emphasized again and again by the occupation forces, and therefore I thought it was my duty to vote. [R. 70.]

In a statement given to the American Consul in Japan, she said (R. 74-75):

> After the termination of war, here, in Japan, there came into effect the Women's Suffrage through which the women were given the chance to participate in the democratic future of Japan and, at the time of the elections, I constantly read much in the newspapers and other publications in addition to election guidance programs over the radio, that were sponsored by the Central Government of Japan and Occupational Authorities from the offices of the Supreme Commander, Eighth Army, and Military Governments, that it was absolutely essential that every woman of voting age in Japan should turn out at the pools (sic) thereby positively asserting themselves as voters and exponents of democracy. So I, in total ignorance of the existence of the Nationality Act, but with a view toward exercising my ideas with respect to democratic practices, voted in the same way as the Japanese women citizens, not realizing for a moment that by so doing, I was in effect, relinquishing my American citizenship. It was only

through the so convincing approach of occupation force voting drives and no talk of we few "orphan Americans" or instructions to us, that prompted me to participate in the great democratic spirit which engulfed everyone at the time.

On cross-examination, the following occurred (R. 93):

Did you hear the appeal that was made by radio to vote? A. (Through the interpreter): Yes, by the radio and by the newspapers.

* *

Q. There was nothing said in any of that radio propaganda that you heard that appealed to Japanese of American birth to vote in those elections, was there? A. (Through the interpreter): No, I didn't hear anything like that.

Q. So that, at the time you voted, you did so as a Japanese citizen, did you not? A. (Through the interpreter): My parents were in America and I have American citizenship but, according to General MacArthur, his instructions were that everybody in Japan should vote; therefore, I thought it was my duty to vote.

The Court: All Japanese?

The Witness (Through the interpreter): Everybody in Japan.

Similarly (R. 95):

> Q. In voting, you were interested in the welfare of Japan, were you not.
>
> A. (Through the interpreter): Since the occupational forces occupied Japan, I believe the voting concerned helping Japan. Therefore, my intention of voting at that time was to help the occupational forces.
>
> Q. Did you know that the occupational forces represented eleven nations? A. (Through the interpreter): I thought it was only America.

In addition, documentary evidence was introduced relating to the authority of the Supreme Commander of the Allied Powers, and the pressure—principally radio and newspaper releases—exerted to induce the Japanese people, and particularly Japanese women, to vote (R. 98-106).

The district court concluded that the elections in which petitioner voted were not political elections because they were subject to the approval of the Supreme Commander for the Allied Powers (R. 43, 41); that Japan was not a foreign state because its government was under the dominance of the conquering powers (R. 31-43); and that petitioner did not vote voluntarily (R. 30-31, 43), but rather that she was "induced so to vote by the United States Occupation Forces in Japan, and by the Headquarters of General Douglas MacArthur"

(R. 30); and that in so voting, she "in good faith believed that she was helping * * * to achieve United States objectives in Japan, by helping to democratize Japan." (R. 30-31.)

The district court also found that petitioner "did not know, and she had no reason to believe, that her voting would result in the loss of, or would in any manner affect her United States citizenship"; and that in voting "she had no intention to, or desire to affect her allegiance to the United States, or to shift her allegiance from the United States to Japan." (R. 31.)

The Court of Appeals reversed (R. 130-137). It concluded that Japan was a foreign state within the meaning of Section 401(e), and that the elections were "political." It further concluded that the District Court's finding that petitioner did not vote voluntarily was clearly erroneous.

ARGUMENT

1. The district court conceded, as petitioner must, that whether Japan, in 1946 and 1947 was "a foreign state or not, it nevertheless was foreign" (R. 9). When, as here, it was not the intention of the conquerors "that the Japanese shall be enslaved as a race or destroyed as a nation"[1] Japan

[1] Potsdam Proclamation of July 26, 1945, reprinted in Plaintiff's Exhibit 2, *Occupation of Japan, Policy and Progress*, Department of State Publication 2671, Far Eastern Series 17, pp. 53-55. This declaration also recited that "(12) The occupying forces of the Allies shall be withdrawn from

remained "foreign" during the period of occupation. *Neely* v. *Henkel* (*No. 1*), 180 U.S. 109, 115-121. That is even more clearly true in the case of Japan than it was with respect to Cuba (whose status was involved in *Neely* v. *Henkel*), for General MacArthur acted "as the agent of the Allied Powers", not solely on behalf of the United States. *Hirota* v. *MacArthur,* 338 U.S. 197, 198.

That Japan remained a foreign "state" within the meaning of Section 401(e) of the Nationality Act of 1940 is hardly less clear. Military occupation of a country does not in itself terminate the life of a country as a separate entity. 1 Hackworth, *Digest of International Law* (1940), Sec. 25, p. 127; Hyde, *International Law* (2nd rev. ed. 1945), Sec. 7, pp. 22-23. However complete the occupation control over Japan, it was never intended to destroy Japan as a separate unit; the aim of the occupation of Japan was its rehabilitation. As Judge Yankwich pointed out in an opinion dealing fully with this question, "in the accepted popular sense, which also has sanction in international law, [occupied Japan] has a *distinct being*, separate and apart from the occupying powers, and capable of commanding allegiance which is incompatible with American nationality. Because of

---

Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government."

such incompatibility, the Congress must have considered it in this sense,—when it designated participation by an American national in a political election in a 'foreign state' as one of the means of losing his American nationality." *Uyeno* v. *Acheson,* 96 F. Supp. 510, 515 (W.D. Wash.).

Moreover, there is real question whether petitioner's contention that Japan was not a "state" is justiciable at all.[2] This Court has long recognized that "Who is the sovereign, *de jure* or *de facto,* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government." *Jones* v. *United States,* 137 U.S. 202, 212, and cases there cited; *Pearcy* v. *Stranahan,* 205 U.S. 257, 265; *Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377, 380; *Williams* v. *Suffolk Ins. Co.,* 13 Pet. 415; cf. *United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304, 319-322. Hence, it may very well be conclusive here that the Department of State deems occupied Japan to be a "foreign state".[3]

---

[2] It is not clear whether petitioner asserts any more than that Japan had no "independent sovereignty" (Pet. 21). Even if it did not, as already pointed out, the Allied Powers and not the United States were sovereign so that, in any event, Japan was a "foreign state".

[3] "On the specific question of whether or not Japan is a foreign state, it is the Department's view that the interna-

2. Petitioner argues (Pet. 15-19) that the elections in which she voted were not "political elections" but merely public opinion polls in that they were subject to the control of the Supreme Commander for the Allied Powers who had announced that he would set them aside if the outcome would interfere with occupation objectives. It is clear, however, that the whole purpose of the elections was to activate the political life of Japan; to have the Japanese people express their views on political matters. The elections were thus clearly political for the purposes of Section 401(e) of the Nationality Act.

The restrictions which were imposed on the Japanese electorate did not foreclose choice nor make their votes merely expressions of desire. See *Kuwahara* v. *Acheson*, 96 F. Supp. 38, 42 (S.D. Cal.). The election of 1946 was a general election of representatives one of whose functions was to be the consideration of a Japanese Constitution. *Political Reorientation of Japan*, p. 315 (lodged with the Clerk of this Court, see Pet. 15, Note 4). The 1947 elections were respectively (1) to choose

---

tional personality or statehood of Japan did not cease as a result of the allied military occupation." Letter dated June 3, 1949, from the Acting Legal Adviser, for the Acting Secretary of State, to the Attorney General. The district court refused to receive this letter in evidence but invited the Government to bring it to his attention on brief (R. 114). This Court has noticed similar letters. See, e.g., *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 380.

all executives, governors, mayors and village and town headmen (April 5), (2) a run-off necessitated by voting in the April 5 election (April 15); (3) to choose the House of Councillors, some chosen from prefectures and some chosen at large (April 20); (4) to choose the House of Representatives (April 25); and (5) to choose assemblymen of prefectures, cities, towns and villages. *Political Reorientation of Japan,* p. 321.

All these elections clearly involve participation in the political affairs of Japan. Domestic administration of Japan was left in Japanese hands.[4] And although the Supreme Commander had indicated that he would, if necessary, exercise power to rescind the 1946 election, it would have been necessary to dissolve the Diet, or representative body, to do so.[5] Indeed, the very document which

---

[4] See Plaintiff's Exhibit 2, *Occupation of Japan, Policy and Progress,* Department of State Publication 2671, Far Eastern Series 17, *United States Initial Post-Surrender Policy for Japan,* August 29, 1945, p. 75: "The Japanese Government will be permitted, under * * * instructions [of the Supreme Commander] to exercise the normal powers of government in matters of domestic administration * * * subject to the right and duty of the Supreme Commander to require changes in * * * machinery or personnel or to act directly if the Emperor or other Japanese authority does not satisfactorily meet the requirements of the Supreme Commander in effectuating the surrender terms."

[5] See Plaintiff's Exhibit 2, *supra,* Appendix 29, *Reply by General MacArthur to Far Eastern Commission on Timing of Elections,* March 29, 1946, p. 139; "Should the results of the election prove disadvantageous to the purposes of the

asserts the power to nullify the results of the election points out the imperative need for a responsible and representative voice of the will of the Japanese people. The Supreme Commander stated:

> The basis of occupational policy is the utilization of the Japanese Government to the fullest extent, under SCAP supervision and control. This is only possible through a functioning legislative body to enact new laws required to implement SCAP directives and to provide for routine governmental business. The alternative is government by Imperial Edict which denies to the Japanese People the right to participate in their own domestic affairs. * * * It is imperative that a more representative body [than the present Diet] be organized at the earliest possible date. The urgent requirements of the present situation demand an expression of popular will. The results of the election will serve to define more clearly the political picture, to clarify

---

occupation, the remedy is always in my power to require the dissolution of the Diet and the holding of a new election under such provisions as are deemed necessary."

The record does not show that this statement was made in connection with any of the 1947 elections. Consequently, in an opinion by Judge Yankwich, it was held that whatever might be said of the April 1946 election, the 1947 elections were political elections. *Uyeno* v. *Acheson*, 96 F. Supp. 510, 516-517 (W.D. Wash.).

> political issues and political parties and to indicate the nature and trend of popular opinion. It will also provide for popular participation in the determination of major questions.[6]

The theory underlying Section 401(e) is that voting in a foreign state is the kind of association with another nation's political affairs which is inconsistent with American citizenship. The committee which drafted the Nationality Act of 1940[7] explained its purpose thus:

> The meaning of this subsection also seems clear. It is applicable to any case of an American who votes in a political election in a foreign state, whether or not he is a national thereof. Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, whether or not the person in question has or acquires the

---

[6] Plaintiff's Exhibit 2, *supra, Reply by General MacArthur to Far Eastern Commission on Timing of Elections,* March 29, 1946, at p. 138.

[7] The Act was drafted by a Committee of advisors appointed by the Secretaries of State and Labor and the Attorney General. Its report to the President was submitted to Congress. Hearings before Committee on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., pp. 405, 490-491.

> nationality of the foreign state. In any event it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other.

The carrying out of such a purpose does not depend on a judgment as to the political effectiveness of the vote in a particular foreign state. The Congress of 1940 cannot have been unaware of the perfunctory referenda that passed as elections in much of Europe at that time. It cannot be seriously supposed that one who participated in as much political determinateness as was left to any of the people of Hitler's Germany, for example, would be permitted to claim that the power of the real governing body to ignore the vote prevented expatriation.

3. Petitioner's contention that her voting was involuntary (Pet. 27-42) is answered by her own testimony. It is clear that she was subject to no duress, no threat of being thrown into a wartime concentration camp or of being denied food rations, as is true of most of the cases on which she relies.[8] All that happened was that petitioner con-

---

[8] *Doreau* v. *Marshall*, 170 F. 2d 721 (C.A. 3); *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C.A. 1); *Tsunashima* v. *Acheson*, 83 F. Supp. 473 (S.D. Cal.); *Ouye* v. *Acheson*, 91 F. Supp. 129

sidered herself sufficiently Japanese to assume that propaganda encouraging the Japanese to vote applied to her. This was not surprising in view of the fact that, in 1947, she had spent all but 3 years and 8 months of her 31 years in Japan. There is no contention that the propaganda was directed to the Japanese Nisei; it was directed to the Japanese to encourage them to assert their Japanese political rights. No one who did not have a sense of being tied to Japan would regard the releases and comments about the assertion of Japanese rights as applying to his situation.

All that petitioner showed was that she did not know of the provisions of Section 401(e) of the Nationality Act. But that is precisely the one consideration which under the decisions of this Court is irrelevant. *MacKenzie* v. *Hare*, 239 U.S. 299, and *Savorgnan* v. *United States*, 338 U.S. 491, together make it clear that a citizen's ignorance of the fact that his voluntary act will cost him his citizenship is not determinative.[9] The District

---

(D. Haw.); *Yamamoto* v. *Acheson*, 93 F. Supp. 346 (D. Ariz.); *Seki* v. *Acheson*, 94 F. Supp. 438 (S.D. Cal.); *Rokui* v. *Acheson*, 94 F. Supp. 439 (S.D. Cal.); *Uyeno* v. *Acheson*, 96 F. Supp. 510 (W.D. Wash.).

[9] *Moser* v. *United States*, 341 U.S. 41, upon which petitioner relies, involved the quite different provisions of Section 3(a) of the Selective Training and Service Act of 1940, as amended, and a very different factual situation. There, government agencies as well as Moser were unclear as to the effect a claim of exemption would have on his right to citizenship and, in-

Court's finding that petitioner's act was involuntary did not involve the resolution of any disputed question of fact: it was a legal conclusion on the basis of petitioner's testimony and the documentary exhibits. Since, as we have shown, this very evidence establishes that petitioner's acts in voting were voluntary, the Court of Appeals properly set aside such findings as clearly erroneous.

The legislative history of Section 401(e) which we have cited, *supra,* pp. 14-15, is, we think a sufficient answer to petitioner's additional suggestion that the Section has no application here because she voted out of her desire to forward United States objectives. For the draftsmen of the Nationality Act asserted first that participation in the political affairs of another country is inconsistent with continued American allegiance. But they went beyond that and said, "in any event, it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality." Thus, it was not the Congressional purpose to make expatriation depend on whether it appeared that the act of voting in fact

---

deed, Moser was specifically advised, through the Swiss consulate, that he could claim exemption without being debarred. Here, as shown, *supra,* petitioner was not so misled. It was only under the Selective Service Act and in those special circumstances that this Court found an "intelligent election" between military service and debarment from citizenship to be required.

reflected a change of allegiance. It is obvious, moreover, that voting in a foreign election, even in these circumstances, is at least as suggestive of a shift of allegiance as merely marrying a foreign subject would, in many cases, be. Yet, marriage to a foreigner is an act which Congress also has validly ordained to be in itself and in all circumstances sufficient reason for expatriation. *MacKenzie* v. *Hare,* 239 U.S. 299.

4. As the petitioner points out (Pet. 14), the constitutional question here presented was put before this Court, earlier this term, on the Government's direct appeals from judgments of invalidity of Section 401(e) and (c) of the Nationality Act of 1940. This Court, on January 2, 1952, vacated those judgments and remanded the causes for specific findings as to the circumstances attending the voting and army service of the appellees in those cases. *Acheson* v. *Okimura,* No. 421, this Term; *Acheson* v. *Murata,* No. 422, this Term. For the reasons stated in the Statement as to Jurisdiction filed in No. 421, and the Memorandum for Appellant in Opposition to Appellees' Motions to Dismiss or Affirm, in Nos. 421 and 422, the Government believes that the petitioner's attack on the constitutionality of Section 401(e) must fail.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
JOHN R. WILKINS,
Attorneys.

FEBRUARY, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE 1952—985592/P.O. 880

FEB 13 195
CHARLES ELMORE CR
CL

IN THE

Supreme Court of the United States

October Term, 1951.

No. 492.

MARIKO KUNIYUKI,

Petitioner.

vs.

DEAN ACHESON, as Secretary of State of the United States of America,

REPLY MEMORANDUM OF PETITIONER.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

SUBJECT INDEX

PAGE

I.

The respondent is in error in its claim that there were no factual issues to be determined by the trial court and that therefore the Court of Appeals could disregard the trial court's findings thereon 1

A. Inferences to be drawn from undisputed facts are still for the trial, and not the appellate, court and do not constitute legal conclusions..... 5

II.

The constitutional issue is still before this court..... 7

III.

The questions of foreign state and political elections..... 8

IV.

Respondent did not meet the issue as to whether 8 U. S. C. 801(e) should be so interpreted as to expatriate an American citizen who voted under the circumstances here prevailing..... 8

Conclusion 9

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Acheson v. Okimura, No. 421, October Term, 1951	5, 6, 7, 8
Acheson v. Murata, No. 422, October Term, 1951	5, 6, 7, 8
Fujiwara v. Acheson, No. 13148	7
Gunning v. Cooley, 281 U. S. 90	6
Hamada v. Acheson, No. 10095(c)	7
Kageyama v. Acheson, No. 10095(d)	7
Kambara v. Acheson, No. 13019	7
Kawakita v. United States, No. 220, Misc., October Term, 1951	9
Kobayashi v. Acheson, No. 10527(b)	7
Nakagawa v. Acheson, No. 12651	7
Nakamura v. Acheson, No. 13354	7
Perkins v. Elg, 307 U. S. 325	10
Sameshima v. Acheson, No. 13054	7
Sasano v. Acheson, No. 11864	7
Sato v. Acheson, No. 9548	7
Takeshita v. Acheson, No. 10302(a)	7
Tanaka v. Acheson, No. 11666	7
United States v. Beatty, 192 F. 2d 945	6
Yamada v. Acheson, No. 12925	7

MISCELLANEOUS

Selected Data on the Occupation of Japan, pp. 1, 131	4

IN THE

Supreme Court of the United States

October Term, 1951.

No. 492.

MARIKO KUNIYUKI,

Petitioner.

vs.

DEAN ACHESON, as Secretary of State of the United States of America,

REPLY MEMORANDUM OF PETITIONER.

Petitioner respectfully requests leave to file this Reply Memorandum to the Brief for the United States in Opposition to the Petition for Writ of Certiorari.

I.

The Respondent Is in Error in Its Claim That There Were No Factual Issues to Be Determined by the Trial Court and That Therefore the Court of Appeals Could Disregard the Trial Court's Findings Thereon.

The very language used by Respondent, to bolster his point that there was no duress, conclusively shows that there was a conflict which the trial court, who observed the witness on the stand, resolved in favor of Petitioner and against Respondent. Thus Respondent says (Br. in Opp., pp. 15 and 16]: "Petitioner considered herself

sufficiently Japanese to assume that propaganda encouraging the Japanese to vote applied to her." But the court found the facts to be just to the contrary. For example, the court found *not* that the propaganda encouraged the "Japanese" to vote, but that the propaganda of the United States Occupation Forces in Japan and of the Headquarters of General Douglas MacArthur urged *"all* persons, *particularly all women,* in Japan to vote." (Italics added.) [R. 30.] This finding is amply supported by the evidence and the Respondent makes no contention that it is not. [See R. 70, 75, 90, 93; Pltf. Ex. 2, p. 25; Pltf. Ex. 5, pp. 4-11; Pltf. Ex. 6.]

Respondent next states (Br. in Opp. p. 16): "There is no contention that the propaganda was directed to the Japanese Nisei." But in so stating Respondent slides past the issue which is *not* whether General McArthur and his headquarters *intended* the propoganda for the Nisei, but whether the propaganda was *understood* by them as applying to them. On this issue, as indicated above, the court found that the Occupation Forces' propaganda was interpreted as applying to *all* persons in Japan [R. 30] and was so understood by petitioner. [R. 30.] These findings are also amply supported by the evidence and were found contrary to Respondent's interpretation. See record references just given above. Furthermore, our occupation forces in Japan soon recognized what the effect of their propaganda on the Nisei voting had been and issued a belated press release calling attention to the fact that Nisei had voted and advising them that they should not so do in the future, lest perhaps they lose their United States citizenship. (See Appendix A to Petition, and unclassified State Department document dated May 5, 1950, and Enclosures 1 and 2 thereto, lodged with the court

below and with this court and referred to by Petitioner in the same manner that Respondent refers to other documents so lodged (Br. in Opp. p. 11), Pet. p. 15, note 4.)

And finally, Respondents' assertion as a fact (Br. in Opp. p. 16) that "no one who did not have a sense of being tied to Japan would regard the releases and comments about the assertion of Japanese rights as applying to his situation" is directly contrary to the facts as found by the trier of fact, which finding is also amply supported by the evidence. In the first place, the occupation forces themselves recognized that the effect of their propaganda was causing Nisei who did not want to forfeit their citizenship to vote (*ibid*). Further, the Court found as follows *after having seen and heard the witness:*

> "In so voting, the plaintiff in good faith believed that she was helping the United States and helping to achieve United States objectives in Japan, by helping to democratize Japan." [R. 30, 31.]
>
> ". . . the plaintiff in so voting had no intention to, or desire to affect her allegiance to the United States, or to shift her allegiance from the United States to Japan." [R. 31.]

The evidence amply supports the *"American,"* not Japanese conduct of Plaintiff-Petitioner. Thus, she testified, and the court (as does Respondent) obviously believed her:

> ". . . It was repeated and emphasized again and again by the occupation forces, and therefore I thought it was my duty to vote." [R. 70.]

Plaintiff testified that her desire to return "to my home in Seattle" [R. 74], was not permitted fruition because "Japan was controlled by militarists. Thus, I was detained in Japan throughout the war." [R. 74.] Further, that she voted "with a view toward exercising my ideas with respect to democratic practices." [R. 75.]

It further appeared in the evidence which the trial court heard, and which the court below did not, that plaintiff made it clear to her employer in Japan that she was and claimed her United States citizenship. [R. 89.] And when asked whether, when she voted "you did so as a Japanese citizen, did you not" [R. 93], she replied: "My parents were in America and I have American citizenship but, according to General MacArthnur, his instructions were that everybody in Japan should vote; therefore, I thought it was my duty to vote." [R. 93.] Later: "At that time, I believed I was an American citizen, but I was living in Japan, at that time, so I voted" [R. 94.], and "my intention of voting at that time was *to help the occupation forces.*" [R. 95.] (Italics added.)

When asked whether she knew "that the occupational forces represented eleven nations" [R. 95], she replied: "I thought it was only America." [R. 95.] This is not surprising; it cannot be expected that petitioner, any more than the average person in Japan, would know of the technical nature of General MacArthur's dual capacity, in one of which he represented *only* the United States. (*Selected Data on the Occupation of Japan*, pp. 1, 131, lodged with this court, Pet. p. 15, note 4.) To petitioner, General MacArthur was an American General in the uniform of the United States Army. To her, and to the people in Japan, he stood for America. And so when Plaintiff was asked as to her understanding of who General Mac-

Arthur was, she logically replied: "I believe he is the person as brought peace in Japan" and that "He represents President Truman." [R. 98.]

Thus it appears that in the light of this evidence (and there is no dispute or contradiction about it) the trial court who—again we repeat—heard and saw the live testimony and observed the witness on the stand—was amply supported in his findings and that indeed, unless he disbelieved her, there could be no other finding.

It is submitted, therefore, that Respondent's assertion that the trial court's finding of involuntariness did not involve the resolution of any disputed question of fact is incorrect, if for no other reason than Respondent himself draws different inferences of fact contrary to those drawn by the trial judge.

A. Inferences to Be Drawn From Undisputed Facts Are Still for the Trial, and Not the Appellate, Court and Do Not Constitute Legal Conclusions.

The trial judge here did the very thing this court ordered the trial judge to do in *Acheson v. Okimura,* No. 421, Oct. Term 1951, and *Acheson v. Murata,* No. 422, Oct. Term 1951. There this court remanded the cases to the trial judge "for specific findings as to the circumstances attending appellee's service in the Japanese Army (and voting in the Japanese elections) and *the reasonable inferences to be drawn therefrom.*" (Italics added.) That is precisely the thing the trial court did in the case at bar. He found in elaborate findings [R. 31-43] the circumstances surrounding petitioner's voting in the Japanese elections, that the occupation forces were all powerful and all encom-

passing and completely dominated the minds of the people in Japan.[1] From these findings, he reasonably inferred that the mind of appellee was not free and unimpaired but rather that the inducement and encouragement from the occupation forces were such as to be incapable of resistance and therefore her act was not free and voluntary. [R. 31.] As this court must have felt when it remanded the *Okimura* and *Murata* cases, it is the trial judge who is peculiarly in a position to ascertain the circumstances and to draw the inferences therefrom on the basis of *all* the evidence before him. Instead, in the case at bar, though the trial court did that very thing, the Court of Appeals usurped the function of the trial judge and sat as the trier of fact itself.

Assuming, *arguendo,* with respondent, that "the District Court's finding that petitioner's act was involuntary did not involve the resolution of any disputed question of fact" (Br. in Opp. 17) because based on "petitioner's testimony and the documentary exhibits" (*ibid.*), nevertheless the inferences to be drawn from the undisputed facts are for the trial, and not the appellate, court. (*Gunning v. Cooley,* 281 U. S. 90, 94.) This principle from the *Gunning* case was succinctly stated recently by the Court of Appeals for the Eighth Circuit in *United States v. Beatty,* 192 F. 2d 945, 948 (C. A. 8, 1951):

> "It must also be remembered that when different *inferences* reasonably and honestly may be drawn *from undisputed facts,* it is for the trial court, and not this Court, to decide what inference shall be drawn." (Italics added.) (Citing the *Gunning* case.)

---

[1]Record and other references to support these findings are set forth in the Petition at pages 21-22, 25-26, 28-30.

Thus here, while the facts before the trial court were undisputed, the inferences to be drawn therefrom were not. Respondent's contrary inferences demonstrate this. Accordingly, the trial court's inferences must remain. The Court below violated this principle.[2]

II.

The Constitutional Issue Is Still Before This Court.

The action of this court in remanding the *Okimura* and *Murata* cases did not dispose of the constitutional issues. Indeed, if this court should, and we submit it should not, go along with the lower court on the factual issue, the constitutional issues are then clearly ripe for

---

[2]Indeed, the error of Respondent's theory, that, because the only evidence was that of the Plaintiff's oral testimony plus the documentary exhibits, the inferences and findings of fact therefrom become only conclusions of law, is highlighted by the fact that not only were the cases cited in the Petition at footnote 1, page 4, decided on just such evidence, but also by the fact that since the filing of the Petition at least 13 more cases were decided, *all in favor of plaintiff*, on just such evidence. What Respondent's theory amounts to, therefore, is that the appellate court and not the trial court becomes the trier of fact. Such a state of affairs is, of course, just not the law. The cases referred to (all in the District Court for the Southern District of California; none reported) are: *Takeshita v. Acheson*, No. 10302(a); *Hamada v. Acheson*, No. 10095(c); *Kageyama v. Acheson*, No. 10095(d); *Kobayashi v. Acheson*, No. 10527(b); *Sato v. Acheson*, No. 9548; *Tanaka v. Acheson*, No. 11666; *Sasano v. Acheson*, No. 11864; *Yamada v. Acheson*, No. 12925; *Sameshima v. Acheson*, No. 13054; *Fujiwara v. Acheson*, No. 13148; *Nakagawa v. Acheson*, No. 12651; *Nakamura v. Acheson*, No. 13354; *Kambara v. Acheson*, No. 13019.

In each of these cases the court found that the plaintiff had acted involuntarily when he voted. This, the trial court found as a fact. Under respondent's view, simply because the only witness was the plaintiff, with the balance of the evidence in the form of documents, the trial court's findings and inferences are to go for naught and the appellate court is to substitute its own judgment *de novo* from the cold record. In effect, what respondent urges is that in these cases the trial courts be put out of business.

decision. If for no other reason than to resolve so important a point involving so many persons and because of the large public concern (see Pet. p. 10), the petition for the writ should be granted. The conflict presented by the decisions of the trial court in *Okimura* and *Murata* and that of the lower court are still present and can only be resolved by this court.

III.

The Questions of Foreign State and Political Elections.

The countervailing arguments of Respondent in his brief and the conflicting decisions of the many courts which have passed on the point in addition to the court below (see Pet. p. 4) only serve to emphasize the necessity for this court to grant the writ to settle so important a point.

IV.

Respondent Did Not Meet the Issue as to Whether 8 U. S. C. 801(e) Should Be so Interpreted as to Expatriate an American Citizen Who Voted Under the Circumstances Here Prevailing.

In ignoring this issue Respondent has refused to face the fact that these elections were ordered by *us*, the United States, and that *we* were the ones who put out the election propaganda and employed, laudibly of course, every means at our command to *get people to vote*. Respondent does not deny this, for he cannot and, indeed, should not, for our motives and conduct were of the highest. But the fact remains, that Respondent though not arguing directly to the point, is urging a construction of the statute clearly and cruelly harsh and one which is not necessary to carry out the purpose which Congress had in mind when it passed

the statute. The very legislative history quoted by Respondent (Br. in Opp. pp. 14 and 15), as well as that quoted by Petitioner (Pet., pp. 38-40), demonstrates that Congress did *not* have this situation in mind. Congress was concerned about a political and practical allegiance to a foreign country, not a vote cast *because* of allegiance to *this* country.

The importance of the resolution of this question calls for the granting of the petition.

Moreover, since the filing of the petition herein, this court has, on February 4, 1952, granted certiorari in *Kawakita v. United States,* No. 220, Misc., Oct Term, 1951. As pointed out in the petition (p. 7), the *Kawakita* case involves a situation where the government argued no loss of citizenship despite an intent to expatriate, while the lower court in the case at bar, pursuant to argument by the *same* government, held that there was loss of citizenship despite an intent not to expatriate. The lower court in each case was the same.

The resolution of this confusion and conflict calls for hearing by this court.

Conclusion.

Petitioner submits, the grave and important public questions presented in this case aside—and it is apprehended that Respondent will agree with her in this—for Petitioner to lose her precious right of United States citizenship under her circumstances and the circumstances of this case would be unfair and a manifest injustice. Her father and mother live in this country [R. 51]; she wants to come home and live with them [R. 74] as a United States citizen [R. 60] and to contribute to the well being of this

land. Her heart is with America. After the war she served the occupation forces as best as she knew how. [R. 60.] Her brother served this country for four years in the Army of the United States [R. 51], serving for two years in the European Theater. [R. 52.] If it be considered, contrary to the findings of the trial court, that the overawing conditions and their effect upon petitioner were such as not to have rendered her acts involuntary, then it must be recognized that she acted only because of a desire to do what this country wanted her to do. Certainly there was mistake and confusion. Citizenship may not be taken away under such a state of affairs. (*Cf., Perkins v. Elg,* 307 U. S. 325, 337.)

Involuntary expatriation under such circumstances simply does not comport with our concepts of justice.

The petition should be granted.[3]

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioner.

---

[3]The petition for writ of certiorari before judgment in the case of *Furusho v. Acheson,* No. ....., Oct. Term, 1951, already filed or to be filed, presents issues identical with those present here and illustrates the necessity for this court to consider the problems involved.